**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**TE WHANGANUI-A-TARA ROHE**

**CIV-2023-485-48**
**[2023] NZHC 2820**

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| BETWEEN | GAUTAM JINDAL<br>Plaintiff |
| AND | IMRAN MOHAMMED KAMAL<br>First Defendant |
| | LIQUIDATION MANAGEMENT LIMITED<br>Second Defendant |
| | KEVIN JOHN DAVIES<br>Third Defendant |
| | PRINCIPLE INSOLVENCY GP LIMITED<br>Fourth Defendant |

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| Hearing: | 2 August 2023 |
| Appearances: | G Jindal, Plaintiff In Person<br>S Price for the First and Second Defendants<br>F E Geiringer for Third and Fourth Defendants |
| Judgment: | 9 October 2023 |

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**JUDGMENT OF ASSOCIATE JUDGE SKELTON**

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[1] This matter involves applications by the first and second defendants and by the third and fourth defendants against the plaintiff for security for costs.

[2] The plaintiff, Gautum Jindal, has sued the defendants for defamation. Mr Jindal is the sole director and shareholder of Orange Capital Ltd (in liquidation) (OCL). OCL was placed in liquidation in 2017.

[3] The first defendant, Imran Kamal, was appointed as the liquidator of OCL. The second defendant, Liquidation Management Ltd (Liquidation Management), is the company through which Mr Kamal undertakes insolvency work.

[4] Mr Kamal resigned as liquidator of OCL on 31 August 2021 and appointed the third defendant, Kevin Davies, in his place. The fourth defendant, Principle Insolvency GP Ltd (Principle Insolvency), is the company thorough which Mr Davies undertakes insolvency work.

[5] Mr Jindal's claim for defamation relates to a six-monthly report (the Report) that Mr Kamal, as liquidator, was required to prepare and provide to the Registrar of Companies under the Companies Act 1993. The Report is dated 23 July 2021.

[6] Mr Jindal alleges that Mr Kamal and Liquidation Management published defamatory statements in the Report. In annexure A to his statement of claim, Mr Jindal identifies nine statements which he alleges are defamatory. The statements relate to complaints having been made to various bodies, representations on OCL's website not being supported by evidence and breaches of the Companies Act. Mr Jindal alleges that Mr Davies and Principle Insolvency are liable as "joint publishers" or "co-publishers" of the defamatory statements through their refusal to remove those statements from the Report.

[7] Mr Jindal seeks a declaration that the statements published by the defendants are defamatory and that all four defendants are jointly and severally liable to the plaintiff in defamation. Mr Jindal seeks damages in the total amount of $250,000, with Mr Kamal and Liquidation Management to be jointly liable for $150,000 and Mr Davies and Principle Liquidation to be jointly liable for $100,000. Mr Jindal also seeks an order that the statements be removed from the Report.

**Legal principles – security for costs**

[8] Rule 5.45(1) and (2) of the High Court Rules 2016 provides:

**5.45 Order for security of costs**

(1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—

(a) that a plaintiff—

(i) is resident out of New Zealand; or

(ii) is a corporation incorporated outside New Zealand; or

(iii) is a subsidiary (within the meaning of section 5 of the Companies Act 1993) of a corporation incorporated outside New Zealand; or

(b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

(2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.

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[9] Applications for security for costs are to be approached in three stages:[1]

(a) the first question is whether the threshold test in r 5.45(1) is met, or in other words, whether the applicant can establish that the rule applies;

(b) if the threshold is met, then the second question is whether it is just in all the circumstances to make an order for security for costs;[2] and

(c) if the Court so concludes, then the third question is the nature of the order that should be made.

[10] Determining the amount of security justified in the particular case requires the exercise of discretion rather than a strict mathematical approach.[3] It does not necessarily need to be fixed by reference to likely costs awards but rather what the

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1 *Busch v Zion Wildlife Gardens Ltd (in rec and liq)* [2012] NZHC 17; and Jessica Gorman and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.45.01]–[HR5.45.04], [HR5.45.07], [HR5.45.09] and [HR5.45.11].

2 Balancing the interests of plaintiff and defendant is the overriding consideration: see *Highgate on Broadway Ltd v Devine* [2012] NZHC 2288, [2013] NZAR 1017 at [24].

3 *Sharp v Pillay* [2017] NZHC 647.

Court thinks fit in all the circumstances.[4] The circumstances to be taken into account include the following:[5]

(a) amount or nature of the relief claimed;

(b) nature of the proceeding, including the complexity and novelty of the issues;

(c) estimated duration of the trial; and

(d) probable costs payable if the plaintiffs are unsuccessful and/or the defendants' estimated actual costs.

[11] A global award of security rather than individual orders may be more appropriate in a case involving multiple defendants as it allows the Court greater flexibility if and when required to allocate the funds to successful defendants.[6]

**The threshold question under r 5.45(1)**

[12] There must be reason to believe that Mr Jindal will be unable to pay the costs of the defendants if he is unsuccessful in the proceeding.

[13] The defendants do not need to prove that Mr Jindal will, in fact, be unable to pay their costs if unsuccessful. What is contemplated by the test is that there is material from which it may be reasonably inferred that Mr Jindal will be unable to pay costs.[7]

[14] The question of whether there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if unsuccessful requires the Court to consider not just

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4 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

5 This summary was adopted by the Court of Appeal in *McNaughton v Miller* [2022] NZCA 273 at [17].

6 *Walker v Forbes* [2017] NZHC 1212 at [91].

7 *Concorde Enterprises Ltd v Anthony Motors (Hutt) No 2* [1977] 1 NZLR 516 (SC) at 519; *Cook v Thomson* [2022] NZHC 3373 at [17]; and *McGechan on Procedure*, above n 1, at [HR5.45.02].

the plaintiff's insolvency in terms of a "snapshot" but requires the Court to take into account any liabilities falling due in the proximate future.[8]

[15] In his second affidavit in opposition to the applications for security for costs, Mr Jindal has provided evidence of his financial position. In summary, he states that:

(a) he expects to earn between $80,000-90,000 this year from employment with Ormiston Legal, and he was paid $9,150 as remuneration on 18 May 2023;

(b) he receives $302 per week from StudyLink as he is an LLM student at AUT;

(c) he intends to apply for a PhD research grant next year and expects to be granted $30,000 per annum as a scholarship;

(d) his spouse earns approximately $120,000 per annum;

(e) he has a cash balance in his bank account of $125,000 (he has provided a confirmation of the bank balance from BNZ as at 27 July 2023).

[16] Mr Jindal also acknowledges that he has debts that are currently payable:

(a) he owes $15,528 for a costs award to Mr Kamal and Liquidation Management in a separate proceeding (CIV 2021-404-2342), where an on order for security for costs has been made against him;[9]

(b) an outstanding amount payable to OCL on his shareholder's current account which he assesses as being $38,070;

(c) he says he owes approximately $38,500 in student loan debt and he also owes $1,500 on a credit card;

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8 *Keezz Ltd (NZCN 6836013) v Waikato District Health Board* [2020] NZHC 2330 at [38]; and *McGechan on Procedure*, above n 1, at [HR5.45.02].

9 The Court of Appeal declined leave to appeal on 1 September 2023 and made a further order for costs against Mr Jindal - *Jindal v Liquidation Management Ltd* [2023] NZCA 413.

(d) he says there is a further costs decision pending in another proceeding he has brought against Mr Davies.[10]

[17] Mr Jindal submits that he does not see any difficulty in paying his immediate debts and still having $75,000 balance remaining.

[18] The defendants take issue with Mr Jindal's evidence and assessment of his financial position and submit that he has not provided a full and forthright explanation of his financial position. The defendants note that:

(a) Mr Jindal stated in his first affidavit in opposition to the security for costs applications that, as at 8 May 2023, his assets were only $2,400, being the balance in his bank account;

(b) he stated in his first affidavit that he was eligible for legal aid and did not have funds to pay any security for costs due to his financial circumstances;

(c) on 12 June 2023, the defendant informed the Court that he had applied for legal aid in relation to these proceedings.

[19] The defendants take issue with how Mr Jindal now claims to have come into funds and to have a bank balance in excess of $100,000. They say that the explanations that Mr Jindal has given only explain about half the funds now shown to be in his bank account; being $40,641.01 in refunds from payments of security for costs in other proceedings and the $9,150 payment from Ormiston Legal.

[20] With regard to the $9,150 payment from Ormiston Legal, the defendants submit that the evidence of the payment suggests that Mr Jindal may be contracting to Ormiston Legal rather than being employed and would therefore have to pay tax for any amounts received.

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10 *Jindal v Davies* [2022] NZHC 3181.

[21] The defendants submit that the source of the balance of the funds showing in Mr Jindal's bank account is not clear. They note that many of the transactions in the bank account records produced by Mr Jindal are redacted but there appear to be deposits from Mr Jindal's wife, indicating that he is being supported by her.

[22] Further, the defendants submit that, even if Mr Jindal does have funds available to him in the order of $100,000, his current debts and liabilities are likely to exhaust if not exceed these funds. Mr Jindal has acknowledged debts in the region of $90,000. However, the defendants submit that the debt owed to OCL on his shareholder's current account is in the amount of $50,696.49 (rather than the $38,070 acknowledged by Mr Jindal), and there are also two costs awards outstanding in the total sum of $4,651.63, and Mr Jindal has exhausted all avenues of appeal in relation to the matter.[11] The defendants say that OCL has started two bankruptcy proceedings against Mr Jindal (CIV-2023-404-550 and CIV-2023-404-1040).

[23] The defendants submit that there will also be a further costs award payable to Mr Davies in separate proceedings in a sum between $10,396 and $13,424.50.[12] The defendants also note that Mr Jindal's bank records show he is paying $30 a week in legal aid repayments on another proceeding.

[24] In reply, Mr Jindal acknowledges that he applied for legal aid in respect of this proceeding. He says that he did not qualify due to his employment with Ormiston Legal and the payment of $9,150 made to him on 18 May 2023, and because his bank balance went above $12,000. Mr Jindal submits that given his improving financial position, there is no need for any order for security for costs.

*Discussion*

[25] Mr Jindal has produced evidence that, as at 27 July 2023, he has funds in the region of $125,000 in his bank account. Previously, he deposed that, as at 8 May 2023, his bank balance was only $2,400 and he would be unable to pay any security for costs due to his financial circumstances and was applying for legal aid.

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11 *Jindal v Orange Capital Ltd (in liq)* [2023] NZSC 36.
12 *Jindal v Davies*, above n 10.

[26] There has apparently been a significant improvement in Mr Jindal's financial position in a matter of a few months. However, there is a lack of clarity in the evidence as to the source of some of the funds now shown in Mr Jindal's bank account. Further, putting aside the issue of the source of some of the funds and whether, for example, Mr Jindal might be required to pay back amounts deposited by his wife, there is evidence before the Court that Mr Jindal has current liabilities and debts that would largely exhaust the current balance.

[27] Mr Jindal's contention that the threshold for an order for security for costs has not been met largely rests on his evidence that he has been engaged by Ormiston Legal, and that he expects to earn $80,000–$90,000 in this financial year. There is no evidence from Ormiston Legal as to Mr Jindal's engagement, and it is not clear whether Mr Jindal is an employee, a contractor, working fulltime, part-time or undertaking intermittent assignments. The evidence establishes one payment of $9,150 being received by Mr Jindal from Ormiston Legal on 18 May 2023. While Mr Jindal stated that he expected to receive another $12,000–$15,000 "very shortly" and similar amounts every month thereafter, there is no evidence of Mr Jindal receiving any further payments since May. On the evidence before me, I am not satisfied that Mr Jindal will earn $80,000–$90,000 in this financial year.

[28] Further, there is evidence that Mr Jindal has commenced and is pursuing at least three other High Court proceedings apart from the present proceeding.[13] Security for costs has recently been ordered in respect of one of these proceedings.[14] In the circumstances, it is difficult to see how Mr Jindal could cover adverse costs awards, if ordered, in all these proceedings.

[29] For these reasons, I am satisfied that there is sufficient material before the Court from which it can reasonably be inferred that Mr Jindal would be unable to pay the costs of the defendants if he is unsuccessful in this proceeding.

[30] Accordingly, I find that the threshold test is met.

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13 The CIV numbers for those proceedings are CIV 2021-404-2342; CIV 2021-404-2280; and CIV 2022-404-2218.

14 *Jindal v Liquidation Management Ltd*, above n 9.

**Whether an order for further security for costs would be just in the circumstances**

[31] Relevant factors for and against the making of an order for security for costs are identified in *Highgate on Broadway Ltd v Devine*.[15] These include, in the context of this proceeding:

(a) the apparent merits of Mr Jindal's claim;

(b) whether the denial of security would be oppressive to the defendants;

(c) whether the plaintiff's impecuniosity was caused by the defendants; and

(d) whether ordering further security deprives the plaintiff of the ability to advance his claim.

**Apparent merits of the claim**

[32] I recognise that there is a limit to the inquiry that can be made into the merits at this early stage of the proceeding and that any assessment is no more than an impression of the case.[16]

[33] This proceeding is at a very early stage. The first and second defendants and the third and fourth defendants have filed statements of defence. Mr Jindal has raised issues with the defendants' pleadings and made applications in this regard which are to be progressed and resolved as necessary after the issue of security for costs has been resolved. At this stage, while not accepting the criticisms raised by Mr Jindal, both sets of defendants have indicated an intention to file amended defences after the determination of the applications for security for costs. The defendants have also raised issues with Mr Jindal's pleadings, some of which will be referred to below in discussing the affirmative defences.

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15 *Highgate on Broadway Ltd v Devine*, above n 2, at [22]–[24].

16 *McNaughton v Miller*, above n 5, at [19]; and *McLachlan Ltd v MEL Network Ltd,* above n 4, at [21]; and *McGechan on Procedure*, above n 1, at [HR5.45.03(2)].

[34] Mr Kamal and Liquidation Management admit that they published the relevant statements in the Report. Mr Davies and Principle Insolvency deny publication. All the defendants deny that the statements in the Report are defamatory. The defendants contend that Mr Jindal's pleaded meanings in annexure A to the statement of claim are impermissibly vague, or do not relate to his character or conduct, and therefore cannot be defamatory of him.

[35] Mr Geiringer, for Mr Davies and Principle Insolvency, notes that Mr Jindal's allegation is that Mr Davies and Principle Insolvency are jointly and severally liable as "joint publishers" or "co-publishers" of the Report. This is based on the contention that Mr Davies, as liquidator, was the sole authorised person who was able to take down or amend the Report on the Companies Office website. Mr Geiringer submits that Mr Jindal's contentions are based on an error of law. He submits that the power to correct erroneous information that has been included in the New Zealand register on the Companies Office website rests solely with the Registrar of Companies and Mr Davies has no such power. Mr Geiringer makes several further points:

(a) first, that an application to have such information corrected can be made by "any person", and if Mr Davies sought to have information corrected, he would need to apply to the Registrar;[17]

(b) Mr Jindal, has at all material times, been equally as capable of seeking such an amendment as Mr Davies;

(c) further, under s 360A of the Companies Act, the Registrar can only correct information if "satisfied that any information has been wrongly entered". Mr Geiringer says that Mr Davies has never refused outright to seek to have the Report altered. Rather, he has consistently maintained that he is unable to take the request to have the information corrected any further unless Mr Jindal provides details as to the information that is inaccurate and the reasons for saying that it is not correct;

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17 Companies Act 1993, s 360A.

(d) as Mr Jindal is yet to provide information that the relevant statements are incorrect beyond his bare assertion that this is so, it remains impossible for Mr Davies to seek the requested amendments, even if he had any duty to do so.

[36] Mr Geiringer also responds to Mr Jindal's allegation that Mr Davies is liable as a co-publisher or joint publisher because, in his first report on 4 July 2022, he "strongly referenced" the Report of Mr Kamal. Mr Geiringer submits that Mr Davies has a duty to refer to the previous reports of Mr Kamal but has made it very clear in his own reports that the views expressed are those of the previous liquidator and that Mr Davies is reviewing the evidence gathered in order to form his own views.

[37] With regard to Principle Insolvency, Mr Geiringer notes that Mr Jindal does not allege any facts or particulars upon which the contention of liability as a "joint publisher" or "co-publisher" could be based.

[38] Counsel for both defendant groups spent some time in oral submissions outlining various affirmative defences which have been or will be pleaded by the defendants in the proceeding. I consider these below.

*No more than minor harm*

[39] Mr Price, for Mr Kamal and Liquidation Management, submits that the Court of Appeal has confirmed that a defamation that does not cause "more than minor harm" is not actionable.[18]

[40] Mr Price submits that, in this case, the extent of publication and the degree of harm is minimal because the Report has only been published on the Companies Register and there is no evidence that anyone has accessed it. Further, anyone wanting to access the Report would need to go through the process of obtaining access to it online, and Mr Jindal is not identified by name in the Report.

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18 *Craig v Slater* [2020] NZCA 305 at [45].

[41] Mr Jindal takes issue with this affirmative defence. He says that the Report is openly accessible to the public and that people searching his name will find the link to Orange Capital Ltd (in liquidation). He also notes that people reading Mr Davies' subsequent reports as liquidator are likely to want to read the previous reports by Mr Kamal. He notes that he was the sole director of OCL.

*Qualified privilege*

[42] The defendants submit that Mr Kamal, as liquidator, had a legal duty to produce and send the Report to the Registrar of Companies and that the report is required to contain among other things, "a summary of the actions the liquidator is taking in the liquidation".[19] Therefore, they submit that the Report is subject to qualified privilege.[20]

[43] The defendants acknowledge that the qualified privilege defence is defeated if the plaintiff can prove that "the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication".[21] However, the defendants submit that there is no evidence of any ill will (or malice) on the part of Mr Kamal. Further, the defendants submit Mr Jindal has failed to provide particulars of ill will as required by s 41 of the Defamation Act 1992.

[44] In his affidavit evidence, Mr Kamal states that he was not motivated by malice when he wrote the Report. He says he wrote the Report in good faith after careful inquiry and believed the conclusions to be true and justified.

[45] Mr Jindal contends that there is evidence of ill will and that, once proper statements of defence have been filed by the defendants, he will provide particulars of ill will under s 41 of the Defamation Act. Mr Jindal refers to two matters which he contends are evidence of ill will by Mr Kamal:

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19 Companies Act, s 255(2)(d); and Companies (Reporting by Insolvency Practitioners) Regulations 2020, regs 6 and 7.

20 *Adam v Ward* [1917] AC 309 (HL).

21 Defamation Act 1992, s 19(1).

(a) first, he notes that the Report records that a complaint had been made to the IRD in relation to the financial statements. Mr Jindal says that there is now evidence that no such complaint has ever been made to the IRD in relation to OCL;

(b) secondly, Mr Jindal says that he sent a letter to Mr Kamal on 23 July 2021 asking him to resign as liquidator for various reasons. He contends that Mr Kamal then amended the contents of the Report and published the Report in retaliation to this letter which shows ill will.

[46] However, as submitted by Mr Price, there is no evidence of any prior version of the Report. Further, he submits that the Report that was published by Mr Kamal states that he undertook careful investigation and does not use intemperate language. Mr Price also submits that there is no spite evident in the transcript of the interview of Mr Jindal by Mr Kamal in his role as liquidator.

*Truth*

[47] Mr Price submits that it is a complete defence to defamation for the defendant to prove on the balance of probabilities that the meanings of what was published were "true, or not materially different from the truth".[22]

[48] Mr Price sets out in his submissions a table which records the impugned statements and evidence of the alleged truth of each of those statements. Mr Price submits that, on the face of the record, there is every likelihood that the truth defences will succeed.

[49] Mr Jindal has also set out a table in his submissions recording why he contends that the impugned statements are not true. In respect of a number of the allegations, Mr Jindal's contention that the statements are not true is based simply on a bare denial by him.

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22 Section 8(3)(a).

[50] In relation to the statements referring to complaints made to the Companies Office and the Financial Markets Authority, Mr Jindal says that Mr Kamal knew that either no action had been taken in relation to the relevant complaint or the complaint was closed prior to the Report. However, Mr Kamal says in his supplementary affidavit that he did not know that no action had been taken in relation to these complaints, or that the complaints had been closed, prior to the issue of the Report.

*Truth as a whole*

[51] Mr Price submits that a defamation defendant may seek to prove that "the publication taken as a whole was in substance true or not materially different from the truth.[23] He submits that the defendant can plead and prove statements that the plaintiff is not suing on. The Court can then look at the evidence for all the statements in the publication and conclude that, given the truth of what can be proved, the publication as a whole is so broadly true that any error in what cannot be proved has had no material effect on the plaintiff's reputation overall.[24]

[52] Mr Price sets out a number of statements from the Report which he says Mr Jindal has chosen not to sue on, and which the Court is entitled to infer are true. He submits that even if one or two of the statements in the Report prove to be inaccurate, given that all the rest can be proved to be true, it is likely that a "truth as a whole" defence will be available.

[53] Mr Jindal submits that, where serious allegations have been made, the Courts demand a high level of accuracy and statements made by liquidators also require a high level of accuracy. He submits that it is unlikely that a report published as a statutory requirement by a professional liquidator will succeed on a "truth as a whole" defence when it has serious factual inaccuracies and was published with malice.

[54] In addition to the four affirmative defences discussed above which Mr Price submits are "extremely strong", the defendants also rely on absolute privilege and honest opinion.

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23 Section 8(3)(b).

24 *Ansley v Penn* HC Christchurch A36/98, 28 August 1998 at 13.

*Absolute privilege*

[55] Mr Price and Mr Geiringer acknowledge that there does not seem to be any express New Zealand authority on whether the Report would be protected by absolute privilege. However, they refer to authority giving absolute privilege to the reports of receivers in different but comparable circumstances.[25] Given the role and powers of liquidators, Mr Price and Mr Geiringer submit that there are good reasons to consider that the Report would be protected by absolute privilege by the common law and/or under s 14 of the Defamation Act.

[56] Mr Jindal relies on decision in *S v W*.[26] In that case, the Court of Appeal considered whether S's complaint to the DHB attracted absolute privilege. The Court was guided by four closely intertwined principles, including that the law of defamation in New Zealand reflects art 17(1) and (2) of the International Covenant on Civil and Political Rights (ICCPR) which provide:[27]

(a) "No one should be subjected to … unlawful attacks on [their] honour and reputation"; and

(b) "Everyone has the right to the protection of the law against such … attacks".

[57] The Court of Appeal referred to the position in Australia as stated by Kirby J in *Mann v O'Neill* that "[t]he common law of Australia should be developed by the courts to uphold such basic principles to the fullest extent possible".[28] The Court of Appeal confirmed that these remarks apply with equal effect to the law in New Zealand.[29]

*Honest Opinion*

[58] With regard to honest opinion, Mr Price acknowledges that careful consideration will have to be given to the way this defence is pleaded, and which of the imputations were conveyed as opinion. Both Mr Price and Mr Geiringer submit

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25 *Burr v Smith* [1908–10] All ER Rep 443 (CA).
26 *S v W* [2022] NZCA 181.
27 At [33] citing International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).
28 *Mann v O'Neill* (1997) 191 CLR 204 at 257.
29 *S v W*, above n 26, at [34].

that at least some of the pleaded meanings are conveyed in the Report as the opinions of the liquidator, including the central allegation that there were breaches of the Companies Act. The defendants also note that the plaintiff has not complied with the requirements of s 39 of the Defamation Act (Notice of allegation that opinion not genuinely held).

[59] Mr Jindal says that once amended statements of defence have been filed, he will comply with the requirements of s 39 of the Defamation Act.

[60] Mr Geiringer submits that Mr Davies can rely on the defence unless he had "reasonable cause to believe that the opinion was not the genuine opinion of" Mr Kamal.[30]

[61] Mr Jindal submits that there is evidence to suggest that Mr Davies had reasonable cause to believe that opinions expressed by Mr Kamal were not genuine opinions because Mr Davies was aware that Mr Kamal was disqualified from acting as an insolvency practitioner, and judgments of the High Court and the Court of Appeal in this regard were a matter of public record.[31]

*Summary*

[62] Overall, my assessment at this stage is that Mr Jindal faces significant difficulties with his claims against the defendants, and particularly against Mr Davies and Principle Insolvency.

[63] First, there are the issues with Mr Jindal's pleadings that have been raised by the defendants and, in particular, his pleading of the alleged meanings of the impugned statements. The defendants contend that the pleadings are impermissibly vague and that some pleaded meanings do not relate to the character or conduct of the plaintiff and therefore cannot be defamatory of him. The defendants submit that unless the

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30 Defamation Act, s 10(2)(b)(ii).

31 *Kamal v Restructuring Insolvency and Turnaround Association New Zealand Inc* [2021] NZHC 1626; and *Kamal v Restructuring Insolvency and Turnaround Association New Zealand Inc* [2021] NZCA 514.

plaintiff repleads the meanings, then it is likely that strike-out and/or summary judgment applications will be made.

[64] Secondly, Mr Jindal seems to have a significant hurdle to overcome to establish publication in respect of Mr Davies and Principle Insolvency as outlined above.

[65] Thirdly, the defendants have or intend to raise a number of affirmative defences, albeit that it is acknowledged that some of these defences are stronger than others. In particular, in my view, this is a case where qualified privilege is likely to apply. Mr Jindal alleges that Mr Kamal was motivated by ill will towards him. However, he has not yet provided particulars of ill will in accordance with s 41 of the Defamation Act. The matters currently relied on by Mr Jindal, discussed above, do not seem to me to be compelling evidence of ill will.

[66] Fourthly, even if the claims were to succeed against any of the defendants, it seems to me that there are good arguments that the damages are likely to be minimal as set out with regard to the potential "no more than minor harm" affirmative defence above.

[67] However, this proceeding is at a very early stage. The defendants are yet to finalise and file amended statements of defence. Mr Jindal says that when that occurs he will then comply with the requirements of ss 39 and 41 of the Defamation Act. There is also scope for Mr Jindal to amend his statement of claim.

[68] Therefore, while my impression at this stage is that the case has limited prospects of success, I cannot say that it is entirely without merit, hopeless or doomed to fail.

**Oppression of applicants**

[69] The defendants contend that denial of security of costs would be oppressive to their reasonable interests.

[70] In *Highgate on Broadway Ltd v Devine*, Kós J stated that:[32]

> Security for costs is relatively exceptional. Where it is likely to result in the denial of access to justice, it is entirely exceptional. But in some situations to allow litigation to proceed without the checks and protection of security will be oppressive to the interests of other parties, particularly where the litigation is unjustified or unmeritorious, over-complicated or unnecessarily protracted.

[71] As discussed above, Mr Jindal's case faces significant hurdles, but I do not consider that it can be said at this stage that the case is altogether without merit or hopeless. Without making any prediction as to the final outcome, there is a reasonable likelihood that costs may be ordered against Mr Jindal. In my view, this weighs in favour of an order for security for costs against Mr Jindal in respect of all the defendants.

**Considerations against making an order**

[72] The first issue is whether it is reasonably probable that the defendants' actions which are the subject of the claim have caused or contributed to Mr Jindal's financial position.

[73] Mr Jindal contends that Mr Kamal has contributed to his weak finances by communicating with his employers in 2022 and 2023 and negatively impacting his employment relationships, including causing the breakdown of his employment relationship with JRD Legal. Mr Jindal contends that these communications with employers have involved highlighting or providing the Report to the employers.

[74] Mr Kamal denies that he sent the Report to any employer or prospective employer of Mr Jindal. He acknowledges contacting a Mr Duckworth at JRD Legal. Mr Kamal has produced an email from Mr Duckworth in which Mr Duckworth says that he had one telephone conversation with Mr Kamal in early February 2022 but did not receive any emails from Mr Kamal. He says that the discussion had no impact on Mr Jindal's employment, and he remained employed until June 2022.

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[32] *Highgate on Broadway v Devine,* above n 2, at [22(e)] (footnote omitted).

[75] The difficulty for Mr Jindal in this regard is that the allegations that he makes against Mr Kamal relate to conduct in 2022 and 2023 which is not the subject of the claims against the defendants in the statement of claim. Further, any linkage between Mr Jindal's financial position and any alleged conduct of Mr Kamal cannot be reliably assessed on the information currently available to the Court. In the circumstances, I do not take this factor into account as being a factor against making an order for security.

[76] The second question is whether an order for security for costs in this case would likely have the effect of preventing Mr Jindal from being able to advance his case.

[77] In *Highgate Broadway Ltd v Devine*,[33] Kós J held that:

> Access to justice is an essential human right. The cost of exercising that right is the payment of costs in the event of failure. The right of a successful defendant to costs in that event is arguably subordinate to the plaintiff's right to be heard. Strong social policy considerations favour the use of Courts as an accessible forum for the resolution of disputes and grievances of almost all kinds. Only where a clear impression can be formed that the plaintiff's claim is altogether without merit – so that in the alternative it would be amenable to being struck out – would it be right for security to be ordered where to do so would bring the plaintiff's claim to dead halt. In cases where the claim is being seriously misconducted (with undue complexity or expense), security orders short of effective termination of the claim may be appropriate.

[78] While there has been an apparent improvement in Mr Jindal's financial position between May 2023 and July 2023, I have found that there is sufficient material before the Court from which it can reasonably be inferred that Mr Jindal would be unable to pay the costs of the defendants if he is unsuccessful in this proceeding.

[79] In the circumstances, it is difficult to assess whether an order for security would prevent him from pursuing his claims. This is likely to depend to a large extent on the quantum of security and whether the security is staged. Having regard to the material before the Court, I do not think that I can go any further than concluding that an order for security for costs will make it more difficult for Mr Jindal to pursue his claims.

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[33] *Highgate on Broadway v Devine,* above n 2, at [23(b)].

[80] I note that the defendants have brought their applications for security early in the proceedings, so delay is not a factor against making an order for security.

**The costs risk**

[81] Counsel for the defendants submit that this case and, in particular, the various affirmative defences that have or will be raised, involves some complexity. The defendants also say that Mr Jindal has demonstrated that he litigates by arguing every point. Therefore, they say there is likely to be a need for multiple conferences and there are likely to be a number of interlocutory applications to be dealt with.

[82] Mr Jindal submits that the case only involves a single publication and cause of action against each of the defendants and that the case is quite concise. He suggests that the complexity is only being added by the defendants raising a potential range of defences.

[83] Mr Geiringer refers to Mr Jindal requiring a jury trial and estimated that the matter would require a one to two-week jury trial. However, Mr Jindal said that he would not be seeking a jury trial.

[84] The defendants submit that costs in defamation cases are often significant and exceed any damages awarded. The defendants seek an order for security of $80,000 per defendant. The defendants have not provided any calculation or breakdown as to how this sum has been arrived at. It seems that it may be based on an assumption that solicitor and client costs would likely be awarded in this case.[34] It is also apparent from the submissions that the security sought includes costs that have already been incurred. Generally, security for costs is future looking and it is not appropriate to make an order for security for costs that have already been incurred.[35]

[85] Mr Jindal referred to a number of recent defamation cases where security for costs was awarded. In particular, he referred to *Exit Timeshare Now (NZ) Ltd v Classic Holidays Ltd*.[36] In that case, there was only one defendant and security for

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34 Defamation Act, s 43.
35 *McGechan on Procedure*, above n 1, at [HR5.45.07].
36 *Exit Timeshare Now (N.Z.) Ltd v Classic Holidays Ltd* [2020] NZHC 2046.

costs was awarded on the basis of 2B scale costs for an estimated three-day hearing in the sum of $33,460.

[86] Mr Geiringer also referred me to several defamation cases where security for costs was awarded against the plaintiff including the recent case of *Cook v Thomson*.[37] In that case, which involved two defendants (jointly represented), security for costs was ordered in the sum of $30,000.

[87] I acknowledge however, that security for costs is case specific, and reference to awards for security in other cases may be of limited assistance.[38]

[88] This case involves four defendants, in two defendant groups: Mr Kamal and Liquidation Management; and Mr Davies and Principle Insolvency. It is apparent that the defendants in each group will be jointly represented, so that there will be one set of legal costs for each group. Further, it seems to me that there will be a number of issues that will be common across the defendant groups. And with a reasonable level of cooperation between the defendant groups, duplication of evidence and submissions on these common issues can be avoided which will reduce the overall costs.

[89] As noted above, where there is a claim against multiple defendants, it is appropriate to make a global award of security rather than individual orders as this allows the Court greater flexibility if and when required to allocate the funds to successful defendants.

**Conclusion**

[90] In my view, balancing what I see as the legitimate interests of Mr Jindal in having access to the Court, and those of the defendants in obtaining protection in respect of their costs, it is just in all the circumstances to make an order for security for costs.

[91] In my view, it is important that both Mr Jindal and the defendants know where they stand. Mr Jindal is entitled to know before pursuing the proceedings any further

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37 *Cook v Thomson*, above n 7.
38 *NZ Iron Sands Holdings Ltd v Toward Industries Ltd* [2019] NZHC 1789 at [18].

the level of security for costs he will be required to pay, and when he will be required to pay the security. The defendants are entitled to know what measure of protection they will have for their costs.

[92] Accordingly, as a global award, I fix security for costs at $60,000. I do not consider that Mr Jindal should be required to pay the full amount of security in a single payment. In my view, it is appropriate that the security be paid in stages between now and any trial.

[93] I consider that $15,000 should be paid within 20 working days of this judgment to cover the completion of pleadings, discovery and any further interlocutory applications. A further $22,500 should be paid by the date for serving Mr Jindal's briefs of evidence; and the final $22,500 should be paid two months before the commencement of trial. I identify these dates as being dates immediately prior to periods during which the parties, and in particular the defendants, will be required to commit significant resources to the litigation.

**Result**

[94] Accordingly, I make the following orders:

(a) pursuant to r 5.45 of the High Court Rules, the plaintiff is to provide security for the defendants' costs in the total sum of $60,000 (on account of the costs of all defendant applicants) to the Registrar of the High Court at Wellington as follows:

(i) $15,000 to be paid within 20 working days of the date of this judgment;

(ii) $22,500 on the date of service of the plaintiff's evidence;

(iii) $22,500 two months prior to the commencement of the trial.

(b) pursuant to r 5.45(3)(b), if any of these amounts remain unpaid after they have fallen due for payment, the plaintiff's case will be stayed until such time as they are paid.

**Costs**

[95] As to costs, there is no reason why costs should not follow the event on a 2B basis in favour of the defendants, together with disbursements as fixed by the Registrar, and I so order.

Associate Judge Skelton

Solicitors:
Langford Law, Wellington for Third and Fourth Defendants